Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States

October Term, 1995

MEREX A.G. and PETER C. LACHMANN,
Petitioners,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Peter C. Lachmann

QUESTIONS PRESENTED

I.

In a just society, do not the Circuit Court proceedings require explanation and correction?

II.

Notwithstanding the Circuit Court's absence of subject matter jurisdiction of the appeal, did not the Circuit Court unfairly act upon the appeal?

III.

Should not Lachmann have been restored as a party plaintiff?

IV.

Should not the contempt rulings have been vacated?

PARTIES

The names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follow: Merex A.G. ("**Merex**")[1], Peter C. Lachmann ("**Lachmann**"), and Fairchild Weston Systems, Inc. ("**Fairchild**").[2]

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[1]Merex A.G. does not have a parent or subsidiary relationship with another company. Merex A.G. was affiliated through stock ownership with plaintiff Merex Corporation.

[2]This Petition is related to Petition No. 94-736 in that matter identified as *Merex A.G. v. Fairchild Weston Systems, Inc.*, 810 F. Supp. 1356 (S.D.N.Y. 1993), *aff'd*, 29 F.3d 821 (2nd Cir. 1994). Petition for Certiorari No. 94-736, which sought review of a mid-trial FRCP Rule 39(c) "advisory jury" ruling concerning a promissory estoppel claim notwithstanding an FRCP Rule 16(e) Final Pre-Trial Order direction for jury trial of *all* claims in effect for fifteen (15) months prior to trial, was denied by order dated January 9, 1995.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

STATUTORY AND RULE PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 2

A. Jurisdiction of the District Court 2

B. Nature of Case, Course of Proceedings, Disposition Below 2

REASONS FOR GRANTING THE WRIT 23

A. Objection to Appellate Jurisdiction 23

B. Lachmann Should Be Restored As A Party Plaintiff 24

C. The Contempt Rulings Should Be Vacated. 24

CONCLUSION 27

APPENDIX A -- ORDER OF
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
DENYING MOTIONS FOR ENTRY OF JUDGMENT
AND FOR VACATUR OF SETTLEMENT
AND REINSTATEMENT OF CLAIMS,
DATED MAY 30, 1994 . . . . . 1a

APPENDIX B -- SUMMARY ORDER
OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
AFFIRMING JUDGMENT OF THE DISTRICT COURT
DATED APRIL 7, 1995 . . . . . 5a

APPENDIX C -- ORDER OF
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DENYING REHEARING WITH SUGGESTION
FOR REHEARING EN BANC,
DATED MAY 18, 1995 . . . . . 10a

APPENDIX D -- TRANSCRIPT EXCERPTS
CONCERNING CONTEMPT OF COURT
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
DATED APRIL 29, 1992 . . . . . 12a

APPENDIX E -- NOTICE OF MOTION
TO ADVISE THE COURT AND FOR DIFFERING PANELS
AND AFFIRMATION IN SUPPORT OF MOTION,
ABSENT EXHIBITS,
DATED MARCH 10, 1995,
AND ENDORSED ORDER DENYING RELIEF,
DATED MARCH 17, 1995 . . . . . 14a

APPENDIX F -- NOTICE OF MOTION
FOR ADJOURNMENT AND REASSIGNMENT
AND AFFIRMATION IN SUPPORT
DATED MARCH 17, 1995
AND ENDORSED ORDER DENYING RELIEF

DATED MARCH 20, 1995 . . . . . 20a

APPENDIX G-- NOTICE OF MOTION
FOR RELIEF RE SUBJECT MATTER JURISDICTION,
AFFIRMATION IN SUPPORT DATED MARCH 24, 1995,
FILED MARCH 27, 1995,
AND ENDORSED ORDER OF
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT DENYING RELIEF
DATED APRIL 7, 1995 . . . . . 23a

APPENDIX H - NOTICE OF
MOTION FOR RELIEF RELATING TO
EN BANC REHEARING AND AFFIRMATION IN SUPPORT,
DATED APRIL 12, 1995
AND ENDORSED ORDER GRANTING IN PART
RELIEF REQUESTED
DATED APRIL 26, 1995 . . . . . 29a

APPENDIX I -- NOTICE OF MOTION
AND AFFIRMATION IN SUPPORT OF
MOTION FOR RELIEF CONCERNING JURISDICTION
AND EN BANC PROCEEDINGS,
ABSENT EXHIBITS,
DATED MAY 22, 1995
AND ENDORSED ORDER DENYING RELIEF
DATED JUNE 7, 1995 . . . . . 33a

TABLE OF AUTHORITIES

Page

CASES

Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al., (Second Circuit C.A.No. 94-9002) (the "**LLL&M Dispute**") 23, 25

Allen v. West Point-Pepperell, Inc., 945 F.2d 40 (2nd Cir. 1991) 24

BAII Banking Corp. v. UPG, Inc., 985 F.2d 685 (2nd Cir. 1993) 24

Curko v. William Spencer & Son, Corp., 294 F.2d 410 (2nd Cir. 1961) 25

Hess v. New Jersey Transit Rail Operations, Inc., 846 F.2d 114 (2nd Cir. 1988) 24

Janneh v. GAF Corp., 887 F.2d 432 (2nd Cir. 1989), *cert. denied* 498 U.S. 865, 111 S.Ct. 177 (1989). 24

Kothe v. Smith, 771 F.2d 667 (2nd Cir. 1985) 24

Merex A.G. v. Fairchild Weston Systems, Inc., 810 F. Supp. 1356 (S.D.N.Y. 1993), *aff'd*, 29 F.3d 821 (2nd Cir. 1994) . . . . . ii, 5, 7

Merex A.G. v. Loral Fairchild Corporation and Fairchild Weston Systems, Inc. (EDNY Civ. No. 95 Civ. 0111) 23

Olympia & York v. INA v. FEI, Ltd. (C.A. No. 93-7547); Petition for Certiorari No. 94-1364 (the "**O&Y Dispute**") 25, 27

Polito v. Polito, 121 AD 2d 614,

503 NYS 2d 867 (AD 2 Dept. 1986) 24

R.R. Village Ass'n, Inc. v. Denver Sewer Corp.,
826 F.2d 1197 (2nd Cir. 1987) 23

United States v. Certain Interests In Property, Etc.,
326 F. 2d 109 (2nd Cir. 1964), *cert. denied* 377 U.S.
978, 84 S.Ct 1884 (1965) 24

STATUTES:

United States

28 U.S.C. §1254(1) 2

28 U.S.C. §1332. 2

New York State

N.Y. Civ. Prac. L. & R. §205(a)
(McKinney 1991) ("Termination of Action;
New Action by Plaintiff") 23

N.Y. Civ. Prac. L. & R. §3004
(McKinney 1991) ("Restoration of Benefits
Before Judgment Unnecessary") 24

N.Y. Gen. Oblig. Law §5-701(a)(10)
(McKinney 1989) (the "**Statute of Frauds**"
or the "**Statute**") 2, 3, 5

RULES

Federal Rules of Civil Procedure:

16(e) . . . . . ii, 2
26 3
37 3
39(c) ii
50 6
51 . . . . . 2, 24, 25
52(a) 25
54(b) 26
58 . . . . . 1, 2, 23

Other United States Rules:

28 U.S.C. 22, Code of Federal Regulations, "International Traffic in Arms,"
Parts 127, 130 ("**ITAR**") 2, 7, 8

OTHER AUTHORITIES

Crain's New York Business, Vol. X, No. 37,
September 12-18, 1994 ("***Crain's***") 26

In The

Supreme Court of the United States

October Term, 1995

MEREX A.G. and PETER C. LACHMANN,
Petitioners,

v.

FAIRCHILD WESTON SYSTEMS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS AND ORDERS BELOW

The Opinion and Order of the District Court which denied Merex's motion for FRCP Rule 58 relief (the "**R. 58 Order**") is not officially reported and appears in Appendix ("**App**") A at 1a. The United States Court of Appeals for the Second Circuit affirmed by Summary Order which officially is not reported and appears in App B at 5a. The order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing *en banc* appears in App C at 10a. The judgment of the District Court appears in App D at 12a.

JURISDICTION

The judgment of the United States District Court for the Southern District of New York was entered on April 29, 1992. An appeal to the United States Court of Appeals for the Second Circuit was denied by Summary Order dated April 7, 1995. A timely petition for rehearing *en banc* was filed on April 21, 1995, and thereafter was denied on May 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

As outlined in the Appendices, the following provisions are involved: FRCP Rules 16(e), 51 and 58, the New York Gen. Oblig. Law §5-701(a)(10) (the "**Statute of Frauds**" or the "**Statute**"), and 28 U.S.C. 22, Code of Federal Regulations, "International Traffic in Arms, " Parts 127, 130 ("**ITAR**").

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

Subject matter jurisdiction in the United States District Court was grounded upon diversity of citizenship. 28 U.S.C. §1332. Petitioner Merex A.G. ("**Merex**") was alleged to be a corporation or other entity organized and existing pursuant to the laws of the Federal Republic of (West) Germany. Petitioner Peter C. Lachmann ("**Lachmann**") was alleged to be a citizen and national of the Federal Republic of (West) Germany. Respondent, Fairchild Weston Systems, Inc. ("**Fairchild**") was alleged to be a corporation organized and existing pursuant to the laws of the State of Delaware.

B. Nature of Case, Course of Proceedings, Disposition Below

The action commenced in 1985, alleged claims for a commission measured against the $20.3M sale price of two (2) reconnaissance cameras sold by Fairchild to the People's Republic of China ("**PRC**") in September, 1984. In January, *1986*, the court directed that Fairchild move for summary judgment:

> THE COURT: [*I] am not going to spend more than five more minutes on this case*.... The only question is, was there an agreement to pay Merex commissions? Now, show it to me, ... [I] will receive... closing briefs,... and,...if I find that your case has no merit...I will award...sanctions.

The Court limited discovery to 60 days. During this time, Fairchild secreted the existence of key witnesses and writings, particularly secreting Fairchild's Controller, T. Egan ("**Egan**") and Asst. Controller, C. Fanneron ("**Fanneron**"), and their pricing files ("**Pricing Files**"), writings which confirm commission obligation to Merex and Lachmann. Notwithstanding improper prompting by S. Wahl, Fairchild's General Counsel, key dispute participant and witness throughout trial ("**Wahl**"), on the 56th day of the 60-day authorized discovery, Egan revealed the secreted documents. The court directed that Fairchild "[P]roduce *all* relevant files, Rule 26,..." (the "**Rule 26 Order**"). Prior to such production, however, Fairchild presented a motion for summary judgment (the "**Sum. J. Motion**") grounded upon the Statute of Frauds (N.Y. Gen. Oblig. Law §5-701(a)(10) (the "**Statute**"). Thereupon, Fairchild redacted the documents which were produced and did not produce others until after denial of the Sum. J. Motion 2½ years later. Notably, *not produced* until that time was Egan's early-April, 1984, memorandum to: "***Commission - cut-out***" as Fairchild's price to the PRC was being reduced, the format changing from sale/resale to direct sale.

In May, 1986, Petitioners opposed the Sum J. Motion. Two and one half (2½) years later, the court denied the motion. Notwithstanding that 3½ years had elapsed since the action's commencement, discovery had proceeded only for 60 days. As Fairchild failed to produce Fanneron, Petitioners sought his deposition by motion (the "**Rule 37 Motion**"). In May, 1989, a Magistrate-Judge authorized the deposition, however, for completion in one (1) day notwithstanding that 123 pages of Fanneron and Egan 1982-84 handwritten notations were to be reviewed, ruling that the Rule 26 Order was "*[u]nenforceab[le] due to the inevitable uncertainty of its meaning*". In December, 1990, the court denied reconsideration. This was the last time counsel appeared before the court prior to trial, i.e., 2½ years later,

notwithstanding repeated requests by Petitioners for a conference.[3]

The Pre-Trial Order ("**PTO**") states:

2. JURY -- NON-JURY:

Plaintiffs have demanded a ***jury trial of all issues***. ***Fairchild accepts such demand***.

3. AMENDMENTS -- DISMISSALS:

A. Plaintiffs' Request to Amend

Plaintiffs seek to amend the Complaint or *by Court Order upon the submission of this Pre-Trial Order to have such pleading deemed amended*...supporting grounds of... intentional...interference with ... *prospective economic advantage claims*... [B]ased upon... improper interference with...commission rights by "**cutting out**"... commissions ... thereafter secreting the key witnesses knowledgeable... T. Egan... and C. Fanneron .... Comprehensive discovery has occurred ... Fairchild is not prejudiced....

In January, 1991, the 45-page PTO was signed by the court, *ordering presentation to the jury of all claims and defenses, including promissory estoppel* and the tortious interference claims. However, at the April, 1992, trial, the court precluded all admissibility - indeed, all reference - to the Pricing Files:

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[3]In 1986, Egan testified that there were "no records" of Pricing Files and that Egan had "no recollection" of any such writings. At trial, Mertins, Sr., testified that the PRC would want Fairchild, the manufacturer, in a *direct* contract. This was stated in the Letter of Intent ("**L/Intent**") composed by Neasham to Zhao Fei, in part which states: "*To U.S. Gov't: The [PRC] intends to purchase from Fairchild*...LORAP cameras..." The L/Intent was the premise for *both* Fairchild's (i) first (i.e., 1982, Merex included) application for export license, and (ii) Fairchild's 1985 "renewal" application for (actual) export to the PRC upon the September, 1984, *direct* sale.

> "This Court examined...*all* of the offered... documents and did not find a single one which states Fairchild was to pay Merex a commission on a direct sale...." (810 F. Supp. at 1368 n38).

Nonetheless, the court did **not** so examine these materials. Simply, the court *declined to review more than a small portion of these writings*.[4] Moreover, these documents *do so state* that Fairchild was to pay Merex (and Lachmann) ***commissions on a direct sale***[5].

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[4]The court denied admissability notwithstanding ***direct*** Fairchild commission obligation to Merex (and Lachmann) in satisfaction of the Statute both prior to and subsequent to the April 6, 1984, change in commission format evidenced in these writings, thus:

> MR. O'CALLAGHAN: Judge, there are more pages I'd like to have addressed.
>
> THE COURT: I have no more pages presented to me, and we are going out. (App S to Petition No. 94-736, at 150a).

[5]Upon court review of the PTO on the first day of trial, for the first time since its submission 15 months earlier, Fairchild objected to the use of ***PTO exhibit numbers***. The court directed that none of Merex's exhibits as numbered - i.e., particularly, evidencing Fairchild's unauthorized redaction/non-production - were to be used, rather, each had to be renumbered, adding that should Merex's counsel represent to the Second Circuit that the court had not granted a conference as had been requested, then: "I'll [the court will] write a letter to the Court of Appeals to hold you in contempt". (A 639, 1578-91). *See* App Q to Petition No. 94-736 at 139a, *et seq.*; *see also*, A 399-400 (6%); A 404 (6%); A 407 (2% and 6%), A 408(2%); Ex Ap. 50 (10%), 89 (8%), 96 (8%-12%) and 161 (8%)).

Initially, Lachmann's written "representation" agreement assured commission compensation to Lachmann upon *any* Germany/Far East sale. Subsequent to the introduction of Fairchild's sale/resale format in late 1982, Lachmann's agreement was re-written in January, 1983, to authorize a commission to Lachmann **only** upon a sale through/with Merex upon "Project Anna". Lachmann testified that in October, 1983, Fairchild unfairly compelled him to withdraw from the project, his commission reduced from 6% to 2%, nonetheless, payable upon *any* Fairchild sale to the PRC. Lay characterized these events: "This is just one of those dirty things you have to do now and then" (A 326-327). Subsequently, upon the direct Fairchild/PRC $20.3M sale, Fairchild renounced all obligation to Lachmann. In 1985, Fairchild offered Lachmann $150,000 in compensation for Lachmann's **unreimbursed** expenses incurred upon Lachmann's thirteen (13) trips to the PRC during two (2) years of dedicated service to Fairchild; however, payable only upon Lachmann's consent not to testify in this action in person or by affidavit on behalf of Merex, unless compelled by district court process. At trial, seven (7) years later, in April, 1992, subsequent to dismissal of all Lachmann claims excepting **quantum meruit** - and absent any PTO enforcement to Lachmann's tortious interference claims - virtually indigent, unemployed since 1983 other than as a "consultant" at nominal income, upon discussion with the court and counsel, Lachmann agreed to accept the same amount as had been offered in 1985. Notably, Lachmann's withdrawal from the trial at that time removed "advisory jury" consideration concerning dismissal of his **quantum meruit** claim upon his written agreement.

Concurrently, the court granted in part Fairchild's R. 50 motion upon the Statute. The court ruled that only Merex's promissory estoppel claim would be presented to the jury, thereupon, notwithstanding *15 months of prejudice*, declared "**advisory**".[6] The ability of Petitioners to present any rebuttal

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[6]Wahl was a key participant to the *unauthorized*, March/April, 1984 direct Fairchild/PRC negotiations, indeed, the author of Ex 83, the *April 4*, 1984, telex to Lay in which Wahl admitted that the sale was: "*contract directly between FWSI/PRC... ...prices...includes only Lachmann...*" Merex, en route to the PRC, already had been "cut-out".

case, particularly grounded upon the Egan and Fanneron depositions and Pricing Files was precluded upon prejudicial rulings concerning subpoena service and irrelevance.

In order to satisfy a *Fairchild requirement* that Fairchild not document the payment of two (2) "commissions" - Lachmann, Fairchild's consultant, had a written commission agreement, Ex Ap 68, - the transaction assumed an illusory "sale/resale" format from August 24, 1982 through April 6, 1984, assuming a direct Fairchild/PRC sale format on April 6, 1984.[7] Fairchild's **1986 secreted** documents revealed, e.g.:

(i) 30016-18, 10/12/84 — (i) Fairchild's Renewal (i.e., direct to PRC) License and (prior) **identical** License to Merex (#MC185078) **both** grounded upon Neasham's L/Intent: "Issuance of the subject license was predicated on a *letter of intent* received from [the PRC's] NORINCO.... **From the inception date of this license [i.e.,12/10/82] Fairchild has been negotiating with [PRC] to conclude a final contract**. On August 27, 1984, Fairchild was

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The court denied use of the Fanneron deposition grounded upon insufficiency of subpoena service, notwithstanding that service had been completed and that the court had declined twice to enforce the subpoena or grant a continuance for presentation of Fanneron as a witness. Upon Wahl's request, the court conferred with Fanneron by telephone, but nonetheless denied enforcement of the subpoena which Fanneron admitted properly had been served upon him for trial attendance.

[7]Fairchild's contention for ***"distributorship" is insupportable***: Fairchild conceded an absence of distributorship in all prior LORAP sales (A 1148); the parties agreed that the transaction contemplated only one sale and so the "Sale/Resale", the e.g., "**Red Book**", format prescribed - ("[T]his contract shall ***not be construed or constitute a distributorship agreement*** ...") (Ex Ap 101); likewise, the Circuit's acceptance of this contention was erroneous (29 F.3d at 822). Merex was not to assume title to military equipment in the real sense, nor take possession; rather, sale/resale was proposed *by Fairchild* so as to conceal Fairchild's ITAR obligation for reporting two (2) commissions, one to Lachmann, the other to Merex - the economics of the transaction were unaffected.

		successful in negotiating such contract..."; (ii) a $304.5K commission to Poly; (iii) "No other payments are to be authorized or reported...."[8] [nonetheless, internally, Fairchild records $270K payable to Lee]. (A 422. 374-76);[9] and
(ii)	001-A, 10/22/84	Fairchild's "Program Budget Release" signed by Egan w/notation "Price $20.3M and $614K commissions" payable to: Poly (3½ % or $304.5K), *Lachmann ($40K)*, and Lee [Merex's former Hong Kong translator] ($270K)[10]. (A 422-23, 374-76).

[8]ITAR required that **all** commissions be documented. ITAR Reg. Part 130.

[9]Together with Lay in 1986, upon Fairchild's Sum J. Motion, Redanz, Kraljic's replacement as Contract Administrator for Project Anna, testified that *no fees* were paid to Lee, *nor* were ***ITAR*** required reports presented to the U.S. Government: "No commissions to anyone" and "No reports" - at trial, the court precluded this testimony which evidenced Fairchild's avoidance of reporting the payment of *two* commissions, i.e., one to Lee and a second to Poly, notwithstanding ITAR. Further, the evidence contradicted Fairchild's Sum J. Motion contentions: substantial commissions were payable to Lee and Poly as evidenced in Fairchild writings, indeed, as authenticated by Lay and executed by Redanz in a report to the U.S. Government!

[10]The court ruled that this payment to Lee had "nothing to do with the case", precluding all development of evidence relating to Merex's contended rationale for Fairchild's insistence upon the illusory sale/resale format, as well, contention for ***ITAR*** violations. (A 1466-96).

The court conducted a manifestly unfair trial, e.g., precluding fair cross-examination of all Fairchild witnesses and admitting prejudicial hearsay. Additionally, the near three (3) week trial conducted before a jury reflects relentless disparagement of Petitioners' counsel by the court, particularly relating to the court's efforts to conceal an absence of ruling upon PTO-included tortious interference claims, those upon which for fifteen (15) months Petitioners had prepared for a *jury* trial.

Contempt Rulings

On the next-to-last day of trial, the jury sought additional instruction relating to the testimony of G.G. Mertins (270 pages) in the form of **Juror Request No. 7**, which states:

> "Your Honor, we request a reading of the testimony of Mr. G.G. Mertins ***regarding*** his discussion with Mr. Neasham about the *structure* of the sale with the PRC. We are interested in anything said about the mode of payment. We think this was in 1982." "We also request a reading of the Mr. G.G. Mertins testimony ***regarding feasibility*** of a sale/ resale transaction with Mr. Neasham." (Emphasis added.)

Counsel exchanged lengthy, virtually identical written responses. On the following day, the court ruled Petitioners' counsel in contempt relating to Petitioners' effort to *propose* responses. (*See* App D at 12a, the "*Endorsement*"). It is apparent that the court's direction for response was *not "clear and specific"*, rather contained an *obvious ambiguity -- concerning time*. The court *may* have intended responses limited to the 1982 Mertins-Neasham "face-to-face" meeting, but was *not* explicit. An objective reading of the transcript demonstrates that *both* counsel understood the first Juror Request and its literal, repeated re-statement by the court, viz., "*regarding* discussions ... with Neasham", not only to include such face-to-face meeting, but also, to include Mertins' recollection of that meeting as *repeatedly* restated/ explained by Mertins to *others*, 1983-1986, e.g., to Pighi, Lay and Lachmann.

Similarly, the second Juror Request addressed Mertins' testimony "regarding *feasibility ... with Neasham*", i.e., conversations between Mertins and Neasham at least in 1982, but as with the first part of the Juror Request, also conversations repeated/ explained by Mertins to others, 1983-86, e.g., especially **Pighi**. Counsels' written exchanges reflected this ambiguity, one which should not provide grounds for "intentional" disrespect, rather vacatur.[11] In context of these events, the transcript records a uniquely abusive proceeding:

The Court: .... Mr. O'Callaghan, what is your first...reference? .... Look, if it's something other than Mertins and Neasham discussing, I don't want the citation. .... Just yes or no. T. 1963-64.

Mr. O'Callaghan: ... [A]s I read the question, [it] is so broad, ...

The Court: Counsel, I'm making a ruling. The jury has requested the reading of the testimony ... of "Mr. G.G. Mertins *regarding his discussion* with Mr. Neasham ...[etc.] So it is very specific. ... Is there anything ... that are a discussion between Mertins and Neasham?

Mr. O'Callaghan: Your Honor, there are so many pages. If I might just precisely answer your question in the limited fashion you've directed ...

The Court [Reading transcript]: "Q. Did he tell you what his idea was? Did he tell you? "A. He was begging us to represent him in China." That is not responsive...

---

[11]To Mertins, the "structure of the sale" was *direct*, i.e., pursuant to the L/Intent. The court endeavored to preclude the re-reading of testimony concerning such "structure" upon denial of a Mertins' "response" supportive of a *direct* sale, erroneously contending a "leading" examination. However, the court, not counsel, had undertaken the direct examination, and had solicited the supportive testimony. (*See* T. 1969-71). This circumstance was in the immediate background for the first contempt ruling: *The Court*: "**Would you please shut up...**".

Mr. O'Callaghan: Your Honor, ... that is right on point. .... This is a German witness. ....

The Court: Look, I told you, I'm not going to listen to a lot of your talk. .... It is unresponsive testimony. T. 1966-68.

* * *

The Court: We start at 341... That's a leading question. "Did he state to you in any way that you would be paid..." And the response by Mr. Neasham was totally objectionable:

> "Naturally, as a business, and very experienced in export manager, we would discuss the condition" -- *And I told him to wait because this is typical of the way* ***you*** *conducted* ***your*** *examination.*

Mr. O'Callaghan: Your Honor, you were speaking to the witness. You were speaking to the witness. You were speaking to the witness. "You wouldn't wait for him," meaning Mr. Neasham, "to say it; you would tell him, wouldn't you?" -- indicating to the witness that Mr. Mertins was telling the witness what his condition was. You were *not* speaking to me, your Honor.... That's my recollection. .... Most respectfully, your Honor, I recall distinctly you were speaking to the witness directly, because the conversation was about Mertins saying to Neasham what it was --

The Court: Wait. .... *I'm addressing you. "You wouldn't wait for him to say it; you would tell him."* That's exactly what I'm talking about, the leading question.

Mr. O'Callaghan: Your Honor, I observed this colloquy and you spoke directly to the witness. .... T. 1969-71.

* * *

Mr. O'Callaghan: .... I submit the letter of intent, ... is critical to the understanding of the parties about what the relationship was.

The Court: *The jury is not concerned about that*. They are asking for the structure of the sale, and they're asking for the testimony, Mertins' testimony regarding the feasibility of the sale/resale transaction with Neasham. Please keep that in mind. .... I'm not interested in the letter of intent. Where was the *structure of the sale*?

Mr. O'Callaghan: The *structure of the sale was the letter of intent*, your Honor. I submit that that's exactly what it was.

The Court: 361 is out unless it deals with *the sale/resale, which is what the jury is asking about*.... Is 363 letter of intent, Mr. O'Callaghan?

Mr. O'Callaghan: That's correct, your Honor.

The Court: Did you hear my ruling? Do you still insist on doing it your way and just dragging this procedure out?

Mr. O'Callaghan: Your Honor, I submit *I have to make a record as to what I'm asking to be read*. It's my responsibility.

The Court: Sir, if it is denied in one place, you don't keep repeating it.... T. 1985-86.

* * *

Mr. O'Callaghan: [T]here's a discussion with Mr. Pighi about the sale/resale. I think that's responsive to the *second part of the juror's question*, about the feasibility of a sale/resale....

The Court: You know, Mr. O'Callaghan, you are not going to drag this out. .... It says, "discussion with Mr. Neasham." Mr. Pighi, you know very well, is not Mr. Neasham. ....

Mr. O'Callaghan: I understand that, your Honor. My request --

The Court: **Would you please shut up**. ... what line --

Mr. O'Callaghan: *I had asked* lines 1 to 4 and 9 to 23.

Mr. Klein: Pighi meeting. **The Court**: Is it really? **Mr. Klein**: Yes.

The Court: I find you in *contempt* of this court and fine you $100. .... Mr. O'Callaghan, is that a Pighi meeting? .... That's all I'm asking you. Is it?

Mr. O'Callaghan: *They are addressing the sale/resale --*

The Court: Is it a Pighi --

Mr. O'Callaghan: -- *with Mr. Neasham.*

The Court: Is it a Pighi meeting between Mertins and Mr. Pighi? On line 373.

Mr. O'Callaghan: He is discussing the sale/resale transaction with Mr. Pighi.

The Court: Is Mr. Neasham part of that discussion?

Mr. O'Callaghan: I don't know at this time if Mr. Neasham was present in the room, your Honor. I do know that it relates -

The Court: Oh, come on; stop fudging the issue.

Mr. O'Callaghan: I don't know if he was present in the room.

The Court: Is this a discussion with Mr. Neasham or is it with Mr. Pighi?

Mr. O'Callaghan: I submit, your Honor, he is talking apparently to Mr. Lay and Mr. Pighi. .... *He's addressing the feasibility of this transaction with Mr. Neasham.*

The Court: Now, wait a minute. You've already got a hundred dollars contempt. ... What's next? T. 1989-91.

* * *

Mr. O'Callaghan: Your Honor, I don't want to belabor the point --

The Court: What is the next?

Mr. O'Callaghan: On 374, on 25, the conversation continues with Mr. Pighi, but it's all about the *discussion he* ***had had*** *with Mr. Neasham*, and I submit that is responsive to the juror's question because he is taking the agent's authority to Mr. Pighi, and , realistically, you, yourself have said the principal cannot give authority to the agent -- ....

The Court: That is a question of law. That is not a question of fact for the jury. What is the next?

Mr. Klein: Our next reference is on page 379.

Mr. O'Callaghan: Your Honor, *I had* proposals on 375. This really relates to --[second part of the jury request] .... *the feasibility* -- .... -- *he discussed with Mr. Neasham* .... I don't mean to belabor the point. T. 1992-93.

The Court: What line, because it's a contempt if it is not a discussion with Neasham. What is it? What line Let's be accurate about it. (No response). Sir, what line? If you are going to take up our time, we are going to know what your are talking about. What line?

Mr. O'Callaghan: Your Honor, line 5, the witness says: "If this idea from Neasham to make distributor contract is not acceptable." I submit he is addressing the feasibility of this. He's not doing it directly with Mr. Neasham, but he is directing the feasibility of it.

The Court: ... [T]hat is the *second contempt* citation ... The answer that Mr. O'Callaghan is proposing the Court read, line 2:

"Yes. I told Mr. Pighi, first of all, we have to wait for

> the letter of intent to see what the Chinese really want. "Secondly, if this idea from Neasham to make distributor contract is not acceptable" -- did I read it correctly. Yes. ....

Mr. O'Callaghan: Well, your Honor, I submit --

The Court: I don't care what you submit. I've given you a contempt citation and fine you $100 for that. What is next please?

Mr. O'Callaghan: May I make a standing point about my understanding, so I don't further create disturbance? ... T. 1994.

* * *

Mr. Klein: *Your Honor, 383,...*

The Court: What is *Exhibit 618*?

Mr. Klein: .... It's a March 1983 ... proposal from ... Redanz ... to Mr. Mertins. ....

The Court: *Is it a conversation with Neasham*?

Mr. Klein: Well, the reason is, ... Mr. Mertins says: "This document here is based on Neasham's request that we are sending a message to his headquarters to give us a price quotation for five units."

The Court: *But it is not a conversation, is it*?

Mr. Klein: *No, it's just pursuant --*

The Court: *So I will not allow it*. What is next?[12] .... T.

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[12]Notwithstanding the Panel's characterization of Fairchild's conduct, Fairchild did *not* "withdraw" its proposals, rather, contended "ambiguity", then, only upon inappropriate court assistance and *subsequent* to the contempt rulings. Further, **the court accepted Fairchild's responses** - e.g., concerning Ex 618 (a Redanz letter) - ***without imposing contempt***, "Court: "***[n]ot* a conversation ....**

1996-7.

* * *

The Court: Is there anything on 397 that has to do with a conversation between Neasham and Mertins about any of the subjects the jury asked?

Mr. O'Callaghan: Your Honor, based on your instruction, I feel I cannot comment on my view on 397 any further.

The Court: You are the one who was asking the questions.

Mr. O'Callaghan: Your honor, *Fairchild* proposed 397.

The Court: Fairchild withdrew it. .... Now, what is it on 397 that is the conversation with Neasham and Fairchild?

Mr. O'Callaghan: In light of your ruling, your Honor, I will not further address 397. ... T. 2005.

* * *

Mr. O'Callaghan: .... There's a *question from the Court* [402] between lines 2 and 7 --

The Court: Just a moment. This is a proposal between yourself and Fairchild. Where is Neasham mentioned here?

Mr. O'Callaghan: Your Honor, I submit that's when he was talking to Mr. Neasham, the spring of '83. It ran from August of '82 into the spring of '83. That's why I addressed it.

So I will allow it." Similarly, at a "*Pighi meeting*" -- *promptly* a "contempt" occurrence for Petitioners' counsel -- Fairchild spoke with impunity: "[P]age 416 ... It refers to a meeting between Mr. Mertins and Mr. Pighi ... *what Mr. Neasham had told him* .... **The Court**: An idea *from Neasham* ... characterization, not ... conversation with Neasham"; then, characteristically, unfairly, to Petitioners' counsel, "[J]ust be careful", T. 2010-11; see similarly, T. 2019-20.

The Court: Where does this refer to a conversation with Mr. Neasham?....

Mr. O'Callaghan: In the context of the trial, the witness spoke to Mr. Neasham.

The Court: Sir, in the context of your Q. and A. --

Mr. O'Callaghan: *I didn't ask him Mr. Neasham's name. In fact, it was the Court.* ....

The Court: Just point out the line and the page. Don't tell me about what you submit. It speaks for itself.

Mr. O'Callaghan: Your Honor, understand, *you asked the witness*: "Did you understand any proposal had been agreed upon between yourself and Fairchild in this period?" *I submit this is the conversation* ***you*** *are referring to with Neasham.*

The Court: *I was asking about a proposal between Mertins and Fairchild.* I asked a direct question, not a word, about what he understood from Neasham or conversations with Neasham. *Contempt No. 3....*

Mr. O'Callaghan: Your Honor, I can't -- I don't know the purpose of your question. It just covers the same period of time as Mr. Neasham.

The Court: Sir, you don't have to know the purpose of my question. You just read the question and read your witness's answer, and you will see what it was. It's perfectly clear. .... T. 2008-2010.

* * *

Mr. Klein: Your Honor, page 416, line 13. It refers to a meeting between Mr. Mertins and Mr. Pighi, but I really can't tell from the answer whether he starts getting into what Mr. Neasham had told him, if you carry it over on to page 417, the questions and the answers.

The Court: He's talking about an idea from Neasham was a dispute or contract. *That's his characterization, not his conversation* with Neasham.

Mr. Klein: ...[O]n ... 416 ...: "... -- [W]hat was the outcome of that meeting relating to the sale/resale Mr. Neasham had discussed with you?"

And then he goes on on the next page to talk about -- and again I can't tell if he's talking about what Merex did or what Merex said to Neasham or what Merex said to Pighi.

The Court: *You see, the questions are so imprecise.*

Mr. O'Callaghan: Your Honor,...I noted this as I went through this.....

The Court: Yes. *Mr. O'Callaghan, just be careful.*

Mr. O'Callaghan: And ... I'm just trying to make my record on behalf of what's occurred here. .... T. 2010-11.

* * *

Mr. Klein: Your Honor, ... [416 ... -- 418] are the two pages *I started talking about before*, where the *witness*, in the context of *discussing a meeting with Pighi, starts talking again about discussions with Neasham*, and it's not clear what he's talking about. ... I think when you look at this to see if the witness is really testifying about a discussion he had with Neasham or not, I'm not ... sure.

The Court: Well, look at it and tell me. (Pause). .... *And if this is a conversation with somebody else, they are talking with Mr. Mertins about the meeting*. .... "Question: ... -- [W]hat was the outcome ... Neasham had discussed with you?" You see, *Mr. O'Callaghan*, when you pose your questions like that, they have to be interpreted literally. *Now, are you talking about* something responsive to the juror's note or aren't you there? You asked the questions.

Mr. O'Callaghan: ...I'm trying to follow this, ... Fairchild ... proposed--

The Court: Sir, is it a discussion with Mr. Neasham?

Mr. O'Callaghan: .... Both sides proposed the same testimony just now.

The Court: .... I didn't ask you what both sides did. I asked you a question. What is your response? Is this responsive to the jury's note?

Mr. O'Callaghan: Your Honor, I -- .... under the burden of your contempt citations --.... -- three times imposed, which I think are improper, I decline to further try to interpret what the record states.

The Court: You asked the questions. This is your examination ....

Mr. O'Callaghan: Your Honor, *Fairchild just was reading this*. I think that they had a proposal to make about it.

The Court: Sir, this is your examination of the witness. Mr. Klein said he didn't know what it was. (Pause).

Mr. O'Callaghan: Your Honor, obviously, page 416, lines 13 to 25, which I proposed and Fairchild agreed to use, referred to the outcome of the discussion that Mr. Neasham had. I submit it is not a conversation with Mr. Neasham, but without it -- but about it.

The Court: Did the jurors ask for that?

Mr. O'Callaghan: My interpretation of the juror's instruction is that they did. You have found me in contempt three times for having that understanding. So I will decline to comment further .... T. 2019-20.

* * *

The Court: The jury's request: "A reading of the testimony of Mertins regarding his discussion with Mr. Neasham about the structure ...[etc.] Now does page 416 respond to that?

Mr. O'Callaghan: Your Honor, I've made my statement. .... It's now noon. I've been sitting here since 10 o'clock. May we take 5 minute? I have a terrible cold. I have medication to take. I would like a five-minute recess.

The Court: What was Mr. O'Callaghan's statement? Lynne, would you read it back to me. (Record read). May I ask you what understanding you are talking about?

Mr. O'Callaghan: Your Honor, I think that -- I think that we have a difference of understanding about the juror's instruction. In good faith, I tried to comply with it. In fact, Fairchild came to the same conclusion about the same pages repeatedly. Obviously, your Honor disagrees. So I think it's appropriate that I don't -- .... -- risk contempt repeatedly because that seems to be the direction of the Court. .... I think it's unfair and oppressive, and I have to submit.

The Court: Mr. Klein, are you offering 415 ...?

Mr. Klein: Your Honor, no. .... [W]e believe they are ambiguous.... Based on our discussion this morning, we are not offering them.

The Court: Mr. O'Callaghan, do you see the difference between the truth and twisting a fact? Five minutes. (Recess) T.2021-22. 12:05 p.m. .... 12:15 p.m. ... All right. Now, talking about page 416, and reading the second part of the request: .... Now, 416 is clearly a conversation with Mr. Pighi. ....: "I told him that this idea from Neasham was a dispute or contract was impossible." .... Now what did he say? What did Mr. Pighi say?, Is that correct, Mr. O'Callaghan? .... Is that responsive?

Mr. O'Callaghan: He was responsive. The witness was responsive to my question.

The Court: Is that responsive to the jury's request?

Mr. O'Callaghan: Your Honor, I decline to respond, if I may, so respectfully, based on your three contempt orders.

The Court: Sir, please.

Mr. O'Callaghan: I offer, if I may, plaintiff's selections as Exhibit 76 and Fairchild's selections which in many ways are simultaneous as plaintiff's 77.

The Court: Sir, now is the time where the record is made as to what both parties either agree or disagree about. And I am making rulings. Mr. Klein has said previously that some of those statements, or whatever, on some exhibit that is not before the Court he withdraws or he doesn't agree with it at this time. So it amounts to a legal zero.

Mr. O'Callaghan: Well, *I submit the exhibits, your Honor. I ask that they be taken concerning this procedure. ....*

The Court: How can you submit something that Mr. Klein does not agree with? [I]f it was identical, all you would have to do is submit it to the reporter,.... The reason I am sitting here painfully going through this is because you said you objected...

Mr. O'Callaghan: Both sides objected. .... [T]he matter of holding me in contempt repeatedly because my understanding is identical to his, ..., is unfair... *Would you take the exhibits, your Honor, so we have a record made of this proceeding*?

The Court: I have told you that those exhibits are worthless because it's just an inter se agreement or preliminary agreement, ... between counsel that counsel has disavowed... T. 2023-26.

Mr. O'Callaghan: Your Honor, I would like to, for the sake of this record today, submit in some fashion the proposals for both sides -- .... -- to sustain my position.

The Court: I have ruled on it. Now you bring it up again.

It's another contempt. You are going to learn to accept rulings and not keep arguing. T. 2032-33.[13]

Inter alia, these rulings should be vacated upon grounds which include *preclusion of all ability for counsel to explain the ambiguity at any time*, as well as:

(i) *First Contempt*: Erroneously, the court integrated the two (2) parts of the Juror Request. The word "*discussion*" does *not* appear in the second part of the Request. Thus, in accord with the Juror Request, Mertins is addressing the "feasibility of a sale/resale transaction with Mr. Neasham". Throughout the 270 page transcript, repeatedly, Mertins so "addressed" such "feasibility ... *with* Mr. Neasham" *with other* Fairchild witnesses, particularly Pighi, so as to demonstrate the "authority" of Neasham -- a central Merex contention found by the jury, nonetheless avoided upon "advisory" dismissal;

(ii) *Second Contempt*: Again, the court improperly integrates the two (2) parts of the Juror Request, i.e., absent the word "discussion".

(iii) *Third Contempt*: Unsuccessful in injudicious efforts to lure Appellants' counsel into another "discussion" contempt-generating ambiguity, the court rules that counsel's unawareness of the court's own "understanding" of the court's own question justifies "contempt". How may this be "fair"?

(iv) *Fourth Contempt*?: The proceedings do not record a "fourth" contempt ruling, but rather the court's continuing efforts to lure Appellants' counsel into

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[13]Upon a Petitioners' motion which included a complete copy of the contempt proceedings, by Order dated February 2, 1994, the Circuit (McLaughlin, J.), ***authorized*** inclusion into the Record on Appeal of these virtually identical proposals. Unfairly, the affirmance attempts to discredit this allowance.

contempt-generating themes, meanwhile, condoning Fairchild's "ambiguity" references, and in conclusion declining unfairly to accept into the record a copy of counsels' virtually identical proposals, Exs 76, 77, i.e., *written evidence* of the ambiguity.

* * *

Shortly thereafter, the jury returned a General Verdict in favor of Merex. Appeal of the court's dismissal of Merex's **complaint** upon "advisory jury" was affirmed on July 14, 1994, by a Second Circuit Panel (the "**Panel**") presided by McLaughlin, USCJ,...[14]

REASONS FOR GRANTING THE WRIT

A. Objection to Appellate Jurisdiction

The R. 58 Order was *not* properly before the Circuit Court. The Order is ***not*** a "final judgment", nor satisfied FRCP Rule 58 "separate document" requirement. *See R.R. Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2nd Cir. 1987) ("judgment must be set forth on a separate document 'distinct from any opinion or memorandum'"). This objection was presented to the Panel by motion filed March 27, 1995, i.e., post-oral argument, in consequence of research undertaken in response to the Panel's inquiries concerning the jurisdictional standing of Merex's counsel to appeal. The motion was denied on April 7,

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[14]On March 10, 1995, Petitioners filed a motion advising the Panel that pursuant to N.Y. Civ. Prac. L. & R. §205(a), Merex had commenced an action grounded upon tortious interference with prospective economic advantage against Fairchild ("**Loral/Fairchild**") in the U.S. District Court, EDNY (Civ. No. 95 Civ. 0111). Initially, the action was assigned to Hon. Thomas C. Platt, USDJ. However, upon Petitioners' letter request to Judge Platt relating to the *Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.*, dispute (Second Circuit C.A.No. 94-9002) (the "**LLL&M Dispute**"), the matter was reassigned to Hon. Arthur D. Spatt, USDJ. Thereupon, prejudicially, Loral/Fairchild wrote to Judge Spatt advising of the circumstances of the requested reassignment. In consequence, Petitioners filed the above motion which also requested differing Panels concerning these appeals (the "**Motion for Differing Panels**"). The motion was denied on March 17, 1995. *See* App E at 14a.

1995. (*See* App G at 23a.)

B. Lachmann Should Be Restored As A Party Plaintiff

Unfairly, the court interfered with Lachmann's reasonable ability to continue pursuit of his claims. Having conducted an unfair trial, the court pressed Lachmann's acceptance of a settlement (upon 1986 terms) or face the court's stated dismissal of his claims, together with repeated erroneous rulings and unfair sanctions admonitions. It is appropriate that the agreement be vacated and that Lachmann's claims be reinstated. *See Janneh v. GAF Corp.*, 887 F. 2d 432-33 (2nd Cir. 1989) (settlement agreement may be challenged upon showing that signed under pressure); *Kothe v. Smith*, 771 F.2d 667 (2nd Cir. 1985) (pressure by trial court to coerce settlement not permissible).[15]

C. The Contempt Rulings Should Be Vacated.

The court imposed injudicious contempt rulings against Petitioners' counsel and only Petitioners' counsel notwithstanding grounded upon the parties' virtual identical proposed responses to the jury request and virtual identical "understandings".[16] FRCP R. 51 *requires* that the court permit counsel to offer objections and explanations concerning jury instructions. *United States v. Certain Interests In Property, Etc.*, 326 F.2d 109, 116 (2nd Cir. 1964). Consistently, R. 51 has been interpreted to require counsel's "distinct" participation concerning jury instructions: *BAII Banking Corp. v. UPG, Inc.*, 985 F.2d 685 (2nd Cir. 1993) (litigant entitled to have jury instructed if supported by evidence and

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[15]*See also, Allen v. West Point-Pepperell, Inc.*, 945 F.2d 40, 47 (2nd Cir. 1991) and N.Y. Civ. Prac. L. & R. §3004 (McKinney 1991) ("Restoration of Benefits Before Judgment Unnecessary"). Similarly, the timing of Lachmann's motion to vacate does not preclude this relief. *See Polito v. Polito*, 121 AD 2d 614, 503 NYS 2d 867, -69 (AD 2 Dept. 1986).

[16]*See Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114-16 (2nd Cir. 1988): "No one may be held in **contempt** ... unless the **order is clear and specific and leaves no uncertainty in the minds** of those to whom it is addressed."

brought to attention of court); *Curko v. William Spencer & Son, Corp.*, 294 F.2d 410 (2nd Cir. 1961) (R. 51 requires *more* than an objection; the grounds must be stated).[17]

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[17]On March 17, 1995, upon identification of Panel membership, Petitioners filed a *Motion for Reassignment* grounded upon the prior "advisory jury" affirmance. Additionally, Petitioners sought such relief grounded upon the then pending Motion for Differing Panels, as well as grounded upon the extraordinarily unfair appeal proceedings with otherwise inexplicable reference to "**Partnership**" claims in an appeal identified as *Olympia & York v. INA v. FEI, Ltd.* (the "**O&Y Dispute**"), C.A. No. 93-7547. The *Motion for Reassignment* was denied on March 20, 1995. *See* App F at 20a.

On April 12, 1995, Petitioners filed a "Motion Relating to *En Banc* Rehearing" requesting (i) an extension of time and increased page limit upon filing of an *en banc* petition and permission to include as an exhibit a copy of the complete trial transcript relating to the contempt rulings, notably, a transcript submission **which had been included in the Appendix** upon the appeal. By order dated April 26, 1995, i.e, five (5) days **subsequent** to Petitioners' filing of the *en banc* petition, in part, Petitioners' motion was granted, however, unfairly so "granted": (i) the Petition *en banc* had been required to be filed and so had been filed five (5) days earlier, thus, the relief "granted" already had become ineffective, and (ii) the requirement for inclusion of Appendix pages already had been satisfied - such transcript pages together with complete transcription of the contempt proceedings were included in the Appendix filed with the Circuit Court on September 23, 1993, i.e., seven (7) months earlier. *See* App H at 29a.

By order to show cause, dated November 29, 1993, in the U.S. District Court, SDNY (93 Civ. 8084) (SS), by undersigned counsel, Alison E. Clapp ("**AEC**") sought preliminary relief against identified Defendants including LeBoeuf, Lamb, Leiby & MacRae ("**LLL&M**"), Hon. Diane A. Lebedeff, Acting Justice of the Supreme Court of the State of New York, and identified Justices of the Appellate Division of the Supreme Court of the State of New York (the "**LLL&M Dispute**"). At a proceeding held December 20, 1993, upon injudicious sanction reference, the district court in the LLL&M Dispute denied preliminary relief to AEC, notably absent statutorily required findings/conclusions. FRCP R. 52(a). The LLL&M Dispute has been presented to this Court upon Petition for Certiorari No. 91-249 (denied October 7, 1991) and Petition for Certiorari No. 94-986 and Motion to Defer Consideration dated November 28, 1994 (both denied January 17, 1995). On June 22, 1995, the Second Circuit *en banc* affirmed the denial of all relief to AEC in the LLL&M Dispute in C.A. No. 94-9002.

Two days subsequent to the denial to AEC of preliminary injunctive relief in the LLL&M Dispute, i.e., on December 22, 1993, the argument of the O&Y Appeal was heard, presenting this extraordinary -- and eventually unfair -- discussion:

Timbers, J.: ...You, quite properly representing your client, attacked the district judge. .... [D]id Judge Griese do anything right in this case? T. 2. ....

McLaughlin, J.: Is it perfectly clear on the record that your claim was severed?

Winter, J.: Would you give us the page number in the appendix where the severance occurred pursuant to the order?

O'Callaghan: Yes, your Honor, if you give me a moment.

Winter, J.:I thought that would be at the tip of your tongue. T.3-4.

.... **Winter, J.**: ...[W]as the jury asked specifically to make separate findings on overhead, retention and taxes? **[O&Y Counsel]**: Not at all.

Winter, J.: ...So we have irrelevant evidence that went in and there's an assumption that the jury felt it was relevant and rendered a judgment on certain claims it wasn't told about....

Timbers, J.: That's what the judge said...

Winter, J.: It's not up to FEI to take something out of the jury's consideration, it's up to the judge.

[O&Y Counsel]: The judge didn't do it either.

Timbers, J.: Maybe he was clearly wrong. Why don't you admit that? T.16-18.

* * *

[O&Y Counsel]: The judge asked...repeatedly, "Show me in the record..." And all Mr. O'Callaghan said was, "You severed my third-party claims. Well, it's true.

Winter, J.:That's what he's saying here? **[O&Y Counsel]**:That's right.

McLaughlin, J.: Isn't that enough to take it out? T. 22.

Winter, J.: .... **When they appealed, why couldn't you have cross-appealed?.... Why aren't you arguing that he can't appeal?** T. 23.

Winter, J.: The burden of your argument, as I understand it, is that the ***Partnership claims***, although severed, were, in fact, the basis for the jury verdict.

[O&Y Counsel]: ...[C]orrect.

McLaughlin, J.: The evidence went in. It was charged to the jury, it was summed up and everything, even though there was a severance. T. 33-34.

* * *

Thereafter, on January 4, 1994, the parties filed letters pursuant to direction relating to R. 54(b) jurisdiction. On June 24, 1994, FEI presented to the Second Circuit a letter -- undocketed -- addressing the delay in issuance of a decision. *Nine (9) months after the appeal was heard -- six (6) years after the district court trial severance* -- upon review of a copy of the September 12-18, 1994, *Crain's New York Business*, Vol. X, No. 37 ("***Crain's***"), front-page headline: "**Bankruptcy feared at O&Y...**", with report of a bankruptcy proceeding scheduled for September 16, 1994, FEI filed a *Motion to Expedite Decision* at 11:39 a.m. on September 15, 1994, including as "Ex A", FEI's June 24, 1994, undocketed letter. At 3:30 p.m., on the same day, i.e., on September 15, 1994, FEI was advised that the *Motion to Expedite Decision* was returned, undocketed, with explanation that a Summary Order on the same day had been filed affirming the district court's dismissal upon a *two (2) line* Summary Order,

IV. CONCLUSION: "Modest" Accountability

In the Second Circuit, where is accountability for[18]:

(i) consistent non-enforcement of, indeed, non-reference to, controlling Federal Rules, fifteen (15) months of unmentioned prejudice upon a PTO court-ordered jury trial of the promissory estoppel claim, nonetheless an "advisory jury" *sui generis* affirmance, which is in conflict with prior, unmentioned, Circuit precedent, and with every other Circuit which has considered this topic;

(ii) ten (10) years of voluminously documented judicial unfairness, culminating in groundless, retributive contempt proceedings; and the

(iii) absence of any restraint upon judicial efforts to transfer to this counsel public responsibility for the ten (10) year judicial maladministration and unfairness of these proceedings.

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together with announcement of "recusal" of Judge Timbers, thus, precluding trial of these Petitioners' counsel's clients' (in Receivership) concededly trial-severed claims in the amount of Five million dollars ($5M). The O&Y Appeal was presented to this Court by Petition for Certiorari No. 94-1364, which petition was denied by order dated April 3, 1995.

[18]By motion dated May 22, 1995, Petitioners sought relief concerning subject matter jurisdiction and relating to the patent unfairness of these several *en banc* appeal proceedings presented by Petitioners' counsel to the Second Circuit. This motion was denied by order dated June 7, 1995. *See* App I at 33a.

In truth, rather than a just consideration, the contempt affirmance appears more to reflect the discomfort with -- and unfair response to -- this counsel's presentation of a meritorious cause, one nonetheless singularly unpopular with some, together with an unfair effort to avoid judicial accountability for a ten (10) year injustice. Lachmann's claims should be reinstated. The affirmance of such a "contempt" spectacle should be vacated. For these reasons, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
July 31, 1995

Respectfully submitted,

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